

LETTER OPINION
98-L-38

April 6, 1998

Mr. Nevin Van de Streek
Minot City Attorney
PO Box 1697
Minot, ND 58702-1697

Dear Mr. Van de Streek:

Thank you for your March 28, 1998, letter concerning whether a city's zoning ordinances apply to state property. The question specifically regards plans of the North Dakota State Fair Association to operate a drag strip at the State Fairgrounds.

In my opinion, a city's zoning authority does not control the use of state property.

City zoning power is dependent upon authority delegated from the state. City of Fargo, Cass County v. Harwood Township, 256 N.W.2d 694, 697 (N.D. 1977). "[A] municipality has no power to zone in the absence of express or implied statutory or constitutional authority." Id. at 697. See also North Dakota Century Code (N.D.C.C.) § 40-47-01 (authorizing cities to adopt zoning regulations).

Generally, a state governmental body is not subject to local zoning regulations or restrictions, unless the Legislature has clearly manifested a contrary intent. City of Bloomfield v. Davis County Community Sch. Dist., 119 N.W.2d 909, 911 (Iowa 1963). See also City of Santa Fe v. Armijo, 634 P.2d 685, 686 (N.M. 1981).

The general rule is summarized in 8 Eugene McQuillin, The Law of Municipal Corporations § 25.15 at 48 (3d ed. 1991) (hereafter, McQuillin, Mun. Corps.). "Municipal zoning regulations or restrictions usually do not apply to the state or any of its subdivisions or agencies, unless the Legislature has clearly manifested a contrary intent." As McQuillin observes, the doctrine of state preemption may apply if enforcement of a zoning ordinance would frustrate state policy "in which event the local zoning mandate is inapplicable in the absence of clear manifestation of legislative intent to the contrary." Id. at 49.

Attorney General Helgi Johanneson reached the same conclusion regarding the question of whether Grand Forks city zoning ordinances controlled building uses at the University of North Dakota. See

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Letter from Attorney General Helgi Johanneson to Harold D. Shaft (February 11, 1964) (concluding "that a city does not have the power to extend city and planning ordinances to property of the State, upon which the institutions of higher education of the state are situated."). The attorney general reasoned that statutes granting municipalities the power to enact zoning regulations cannot authorize the extension of such regulations to state institutions of higher education. The attorney general found no grant of powers to a municipality under zoning authority which would permit a municipality to "limit the governmental authority of the State." Id. at 2. See also 1990 N.D. Att'y Gen. Op. 90, 92-93 (concluding that a county may not use its general zoning authority to regulate oil and gas activity which is specifically regulated by the state); Letter from Attorney General Helgi Johanneson to Fred Saefke (November 27, 1972) (advising that property of the state is exempt from municipal regulation in the absence of waiver on the part of the state and that "city ordinances of the city of Bismarck do not apply to any activity of the state" although "persons who are not performing a governmental function who may be violating a city ordinance on the capitol grounds, could be prosecuted . . . if it is not in conflict with a state law or regulation governing the action in question."). Id. at 1-2.

"The tendency of the courts is to avoid precise formulae or ritualistic criteria and to determine the issue of immunity based upon the broad test of the legislative intent with respect to the particular governmental agency or function involved." 8 McQuillin Mun. Corps. § 25.15 at 50 (citing Rutgers, State University v. Piluso, 286 A.2d 697, 702 (N.J. 1972) holding that Rutgers University was not subject to township zoning ordinances). The New Jersey Supreme Court in the Rutgers case found that the true test of immunity from zoning is based on legislative intent. Id. at 702. The court advised that such intent, rarely specifically expressed, was to be discerned from "the nature and scope of the instrumentality seeking immunity, the kind of function or land use involved, the extent of the public interest to be served thereby, the effect local land use regulation would have upon the enterprise concerned and the impact upon legitimate local interests." Id. at 702.

The court advised that "there can be little doubt that, as an instrumentality of the state performing an essential governmental function for the benefit of all the people of the state, the Legislature would not intend that [Rutgers'] growth and development should be subject to restriction or control by local land use regulation. Indeed, such would generally be true in the case of all state functions and agencies." Id. at 703. But see City of Ames v. Story County, 392 N.W.2d 145 (Iowa 1986) (adopting a balancing of public interests test regarding competing zoning regulations of

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political subdivisions); City of Fargo, Cass County v. Harwood Township, 256 N.W.2d 694 (N.D. 1977) (same).

The North Dakota State Fair Association (hereafter "Association") is a statutory state agency. Bolinske v. N.D. State Fair Ass'n, 522 N.W.2d 426, 428 (N.D. 1994). There is no indication in N.D.C.C. ch. 4-02.1 pertaining to the establishment and operation of the Association that the Legislature intended the state fairgrounds to be subject to local zoning control.

The requirements of N.D.C.C. § 4-02.1-23 that the Association, in regulating all shows, exhibitions, performances, establishments, and those granted fair privileges, ensure that "such enterprises are properly licensed" and that they comply with all state and local laws and all rules and regulations of the Association, is consistent with authority of the Association to govern the fairgrounds. N.D.C.C. § 4-02.1-13.

N.D.C.C. § 4-02.1-13 empowers the Association to "make all bylaws, ordinances, rules and regulations, not inconsistent with law . . . for the government of the grounds on which the state fair is to be held . . . for the protection, health, safety, and comfort of the public."

Consequently, it is my opinion that the use of Association property is not governed or controlled by Minot zoning and use regulations.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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